FILE:

B-216081

DATE: December 4, 1984

MATTER OF: Wholesale Office Furniture, Inc. キAエタウンプ

DIGEST:

1. Generally, if descriptive literature accompanying a bid does not show compliance with the specifications set forth in a proper descriptive literature requirement, the bid must be rejected as nonresponsive. However, descriptive literature does not have to show compliance with specifications beyond those clearly set forth.

- Slight modifications to existing products do not violate an IFB provision limiting offers to the manufacturer's current standard model.
- 3. Whether a contractor will in fact deliver a conforming product, and the appropriate action to be taken if it does not, are matters of contract administration for resolution by the contracting agency, not this Office.
- 4. In brand name or equal solicitations, a bid offering an allegedly "equal" product must contain sufficient descriptive material to permit the contracting activity to assess whether the offered alternative possesses each salient characteristic of the brand name product set forth in the solicitation.
- A nonresponsive bid may not be amended after bid opening in order to make it responsive.

Wholesale Office Furniture, Inc. protests the award of contracts to Office Concepts Hawaii and Herman Miller, Inc., respectively, under invitations for bids Nos. DAHC77-84-B-0603 (IFB-0603) and DAHC77-84-B-0622 (IFB-0622), issued by the Department of the Army. Wholesale alleges that the bid of Office Concepts Hawaii under IFB-0603 should have been rejected as nonresponsive because the descriptive literature accompanying the firm's bid failed to show that its product conformed to certain material specifications set forth in the solicitation. Alternatively, Wholesale argues that, if Office Concepts' bid were properly accepted, then the Army should not have later rejected Wholesale's bid under IFB-0622 for essentially the same reason, that is, deficient descriptive literature. We deny the protest.

## IFB-0603

The solicitation was issued on May 1, 1984, for offers to supply various types of office furniture suitable for use with automatic data processing (ADP) equipment. The solicitation set forth numerous specifications for the furniture including dimensions and style configurations, along with the general requirement that product brochures had to accompany the bids for evaluation purposes. The IFB also provided that the offered furniture had to be "the manufacturer's current standard model."

The Army received three bids in response to the IFB, which were evaluated for conformity with the specifications through an examination of the accompanying descriptive literature. The Army determined that the bids of Wholesale and Office Concepts were both responsive, and awarded the contract to Office Concepts, the low bidder, on June 14.

Wholesale protested to the Army that the award was improper because Office Concepts' literature failed to show that certain items of furniture complied with the specifications. Specifically, Wholesale noted that the literature indicated that the firm's offered workstation tables were only 28 inches high, whereas the IFB had specified a minimum height of 29 inches, and that the filing pedestals conformed neither to the specified height limitation of 15.5 inches, nor to the specified drawer and handle configurations.

In response to the protest, the Army directed Office Concepts to suspend delivery and asked the firm for its comments in the matter. By letter of reply, Office Concepts stated that:

"we will meet the provisions and specifications of the subject contract.

Brochures were provided as reference only and we will make the furniture and accessories to your requirements."

The Army then denied Wholesale's protest and instructed Office Concepts to proceed with delivery, advising the firm, however, that any delivered furniture nonconforming to the specifications would be rejected.

## Protest and Analysis

Wholesale asserts that Office Concepts' bid should have been determined to be nonresponsive because the firm's literature failed to show that the offered workstation tables and filing pedestals conformed to the specifications at issue. Further, Wholesale urges that even if Office Concepts can have these pieces of furniture altered to meet the Army's requirements, the acceptance of such items will violate the IFB's provision that offered products had to be the manufacturer's current standard models, as well as the well-established prohibition against the modification of bids after bid opening. Wholesale also asserts that Office Concepts will obtain the furniture from a concern that is not itself the manufacturer, as required by the solicitation, but rather a concern that is only a "jobber," or assembler of components.

An agency has the primary responsibility to draft specifications reflecting its minimum needs as well as determining that products offered meet those specifications. Thus, an IFB may require that descriptive literature, such as product brochures, accompany each bid for the purpose of bid evaluation, if such information is needed to aid the agency in determining whether the product offered meets the specifications and in concluding what the government would be binding itself to purchase by the making of an award. If the need for descriptive literature can be

justified, the IFB must clearly establish the nature and extent of the descriptive material asked for, the purpose to be served by such data, and whether all details of such data will be considered an integral part of the awarded contract. Air Plastics, Inc., 53 Comp. Gen. 622 (1974), 74-1 CPD ¶ 100. In that regard, therefore, descriptive literature does not have to show compliance with specifications beyond those clearly set forth. Computer Sciences Corp., B-213134, May 14, 1984, 84-1 CPD ¶ 518. However, if the literature accompanying a bid does not show compliance with a proper descriptive literature requirement, the bid ordinarily must be rejected as nonresponsive. Amray, Inc., B-205037, Feb. 9, 1982, 82-1 CPD ¶ 116.

We believe that the provision in IFB-0603 requiring the submission of brochures for product evaluation purposes was not effective as a descriptive literature requirement. The procurement regulations provide that a descriptive literature clause must advise bidders of the particular specifications for which the literature has to demonstrate product compliance, and must also caution that failure of the literature to show such compliance will require rejection of the bid as nonresponsive—clearly not the language employed here. See Federal Acquisition Regulation, § 52.214-21, 48 Fed. Reg. 42,102, 42,501 (1983) (to be codified at 48 C.F.R. § 52.214-21).

As the Army states, the purpose for obtaining product brochures was to enable the contracting activity to evaluate the overall compatibility of the offered furniture with the ADP equipment. The brochures were not required to demonstrate a product's total conformity with every detail of the specifications set forth in the IFB. Therefore, since the provision requiring the submission of brochures did not set forth any specifications for which compliance had to be shown, the fact that Office Concepts' literature may have indicated certain deviations did not render the firm's bid nonresponsive. Computer Sciences Corp., supra. Moreover, we note that the contracting activity evaluated the bids for technical adequacy, and determined that any deviations from the specifications indicated by Office Concepts' literature were immaterial to the agency's needs.

In response to Wholesale's protest, the Army affored Office Concepts the opportunity to confirm that its furniture would be made to comply with the specifications. Since

the contract has already been awarded, whether Office Concepts in fact will deliver conforming furniture to the Army's satisfaction, and the appropriate action to be taken if it does not, are matters of contract administration for resolution by the Army, not this Office. South Central Corp., B-211528.2, Aug. 9, 1983, 83-2 CPD ¶ 191.

We do not agree with Wholesale's assertion that the IFB's provision requiring bidders to offer the manufacturer's current standard model will be violated if Office Concepts now slightly alters the dimensions and configurations of certain items. That provision is read as prohibiting offers for products that are either newly developed and, therefore, without an adequate commercial history, or products that are no longer manufactured. The reason behind the provision is, of course, to ensure a reasonable degree of reliability as well as the availability of replacement parts if needed. There is no indication that the minor changes to the furniture will adversely affect those considerations. Furthermore, the product literature furnished by Office Concepts stated that the manufacturer would be able to custom-tailor its furniture in certain areas if required. Therefore, we cannot conclude that these alterations will necessarily make the items in question nonstandard models in violation of the subject provision. See Wiltron Company, B-213135, Sept. 14, 1984, 84-2 CPD  $\P$   $\overline{293}$ .

We also do not agree with Wholesale's assertion that the terms of the solicitation have been violated because the supplier from whom Office Concepts will obtain the furniture in question is not the manufacturer, but rather a "jobber," or assembler of components. Wholesale refers to section L, paragraph 17.(3) of the IFB which requires bidders to furnish the "Name of the principal manufacturer (not Dealer) of the supplies." It is Wholesale's contention that a "jobber" is not a manufacturer. However, given the fact that many concerns which are regarded as manufacturers obtain and assemble a wide variety of components provided by subsidiaries and other suppliers, we do not believe that Office Concepts' supplier should be regarded as other than the manufacturer.

## IFB-0622

The IFB was issued on June 13, 1984, for various types of executive and conference chairs on a brand name or equal basis, with chairs manufactured by Herman Miller, Inc. specified as the brand for all items. The IFB contained the same provision as in IFB-0603 that brochures were required for product evaluation purposes, but further required that fabric samples and color charts were to accompany the bids. Additionally, the solicitation clearly advised bidders that the procurement was being conducted on a brand name or equal basis. The IFB provided that bids offering "equal" products would be considered for award if the products were clearly identified in the bid and the contracting activity determined that they fully met the salient characteristics of the Herman Miller chairs. However, bids would not be rejected:

"because of minor differences in design, construction, or features which do not affect the suitability of the products for their intended use."

Since any determination as to the equality of offered products would be based upon information furnished in the bids, the IFB cautioned that the contracting activity would not be responsible for locating or securing any information not identified in the bids and reasonably available to the contracting activity:

"Accordingly, to insure that sufficient information is available, the bidder must furnish . . . all descriptive material . . . necessary for the purchasing activity to (i) determine whether the product offered meets the salient characteristics . . . and (ii) establish exactly what the bidder proposes to furnish and what the Government would be binding itself to purchase by making an award."

Seven bids were received in response to the IFB, with Wholesale offering the low price of \$180,555.18, with Herman Miller second low at \$229,192.75. Wholesale offered to

furnish "RABAMI" chairs, manufactured in Denmark, as its "equal" product. However, as the result of a technical evaluation of the submitted literature, the contracting activity rejected Wholesale's bid as nonresponsive because it was determined that the "RABAMI" chairs were not equal to the Herman Miller chairs in certain material respects. In the Army's view, the most crucial salient characteristic not met by Wholesale's alternative product was the specification for 100 percent nylon fabric covering. The descriptive literature furnished by Wholesale stated that the "RABAMI" chairs were covered in "100 Rayon," although Wholesale had in fact noted directly on the literature that "Wool/Nylon Combo" and "100% Nylon" were available for several items at no extra charge.

According to the Army, Wholesale had provided only a single sheet brochure and color chart with its bid, but not fabric samples, as required. The Army felt that this information was insufficient to establish that the "RABAMI" chairs fully met the salient characteristics of the Herman Miller product, especially with respect to fabric covering. The Army's position is that nylon is a material requirement affecting the quality of the chairs because it is desired for its strength, durability, and resistance to stains. The Army relates that Wholesale offered, after bid opening, to demonstrate the "RABAMI" product and to provide additional information not submitted with its bid. The Army did not accept the offer, and informed Wholesale that such an action would be an impermissible violation of the procurement regulations.

## Protest and Analysis

Wholesale asserts that its offered product was equal to the Herman Miller chairs in all material respects. The firm maintains that the literature furnished with its bid was complete for evaluation purposes, and that it had clearly noted on the "RABAMI" brochure that nylon fabric was available at no extra cost. It is also Wholesale's apparent

 $<sup>\</sup>frac{1}{\text{The}}$  "100% Nylon" notation is itself ambiguous because it is followed by the note "See \*." The "\*" refers the reader to the "Wool/Nylon Combo" notation.

position in this regard that nylon and rayon<sup>2</sup>/ have essentially the same properties. Wholesale contends that any other deviations from the salient characteristics of the Herman Miller product that may have been indicated in the "RABAMI" brochure were minor ones which did not affect the suitability of the product. Wholesale believes that the Army acted improperly by not allowing it to furnish additional information and to demonstrate the features of the "RABAMI" chairs after bid opening. Essentially, as indicated earlier, Wholesale urges that the Army could not have properly rejected its bid under IFB-0622 because of defective descriptive literature, after having accepted Office Concepts' bid under IFB-0603. We do not agree.

We point out that, unlike IFB-0603, IFB-0622 was a brand name or equal solicitation. To be responsive to a solicitation issued on that basis, a bid offering an allegedly "equal" product must contain sufficient descriptive material to permit the contracting activity to assess whether the offered alternative possesses each salient characteristic of the brand name product. Clearr Corp., B-208929, June 21, 1983, 83-2 CPD ¶ 8. It is not enough that the bidder believes that the product is equal, or that the offered item might actually function as well as the brand name product. A.A. Lasher, Inc., B-193932, Mar. 14, 1979, 79-1 CPD  $\P$  182. Where there is insufficient data in the bid to show that the offered item in fact conforms, the bid must be rejected as nonresponsive. Clearr Corp., supra. In this regard, the bidder clearly bears the responsibility for preparing and submitting a proper, responsive bid. See The Library Store, Ltd., B-213258, Feb. 9, 1984, 84-1 CPD 1 162.

From our examination of the literature submitted with Wholesale's bid, we conclude that it was impossible to tell what fabric would be used as a covering for the "RABAMI"

<sup>2/</sup>According to Wholesale, the word "rayon" means nylon in Europe, where the chair is manufactured. There is no evidence to substantiate this assertion, and nothing thus accompanied the bid that would lead the contracting officer to this conclusion, even if accurate.

chairs. The "RABAMI" literature clearly states that the chairs are covered with "100% Rayon." Apart from the hand-written notations added by Wholesale, there is simply no indication from the manufacturer that nylon fabric is in fact available, nor indeed any legal commitment from Wholesale to furnish it. In this regard also, even if the notations are accurate, we fail to see how the notation "Wool/Nylon Combo" equates with the requirement for 100 percent nylon.

We do not feel that the Army was unreasonable in determining that this salient characteristic, among others, had to be met by products offered as "equals," and that the use of another fabric would not be viewed as a minor difference. We point out that, unlike the earlier procurement for various types of office furniture, such as workstation tables and filing pedestals, suitable for integration with ADP equipment, IFB-0622 sought furniture that was intended for long-term human use. Therefore, we believe the Army was justified in requiring assurances from the submitted literature that those desired construction features of the Herman Miller chairs were also present in any alternative products. Although we do not choose to enter a dispute as to the relative merits of nylon and rayon, Wholesale has not shown us that the Army is incorrect in its position that nylon is a more suitable fabric because of its strength, durability, and resistance to staining. In this connection, we emphasize that Wholesale also did not submit with its bid the sample of the fabric it actually intended to furnish, as the solicitation required.

To the extent that Wholesale contends that the Army acted improperly by not allowing it to demonstrate the "RABAMI" product and furnish additional information to establish the equality of its product after bid opening, it is well-settled that a nonresponsive bid may not be amended after bid opening in order to make it responsive.

General Electric Company, B-184873, May 4, 1976, 76-1 CPD 1298. We point out to the firm that section L of the IFB expressly stated that modifications proposed after bid opening to make a product conform to the brand name product would not be considered.

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The protest is denied.

Comptroller General of the United States